APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-3359 and No. 92-3360

WILLIAM M. LIPS,
Appellee/Cross-Appellant,

v.

COMMANDANT, UNITED STATES
DISCIPLINARY BARRACKS,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 88-3396-R)

[Filed July 1, 1993]

Jan Horbaly, Burke, Virginia, for Appellee Cross-Appellant.

Thomas E. Booth and David Shelledy, United States Department of Justice, Appellate Section, Criminal Division, Washington, D.C. (Jackie A. Rapstine, Assistant U.S. Attorney; Lee Thompson, U.S. Attorney, Topeka, Kansas; and Conrad Von Wald, LTC., Office of the Judge Advocate General, U.S. Air Force, Washington, D.C., with him on the brief), for Appellant/Cross-Appellee.

Before TACHA and BALDOCK, Circuit Judges, and McWILLIAMS, Senior Circuit Judge.

McWILLIAMS, Senior Circuit Judge.

This case concerns the relationship between the federal civil courts and the military courts.

William M. Lips, a Senior Master Sergeant serving on active duty in the United States Air Force and assigned to the 50th Civil Engineering Squadron at Hahn Air Force Base in Germany, was convicted in 1984 by a military jury of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925; and aggravated assault (three counts), in violation of Article 128, UCMJ, 10 U.S.C. § 928. Lips was sentenced, *inter alia*, to twenty years' imprisonment.

On direct appeal, the United States Air Force Court of Military Review affirmed Lips' conviction and sentence. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The United States Court of Military Appeals denied discretionary review, *United States v. Lips*, 24 M.J. 45 (CMA 1987), and also denied Lips' petition for reconsideration, 24 M.J. 203 (CMA 1987). Thereafter the Judge Advocate General of the Air Force denied Lips' motion for a new trial.

In 1988, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas, Lips filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the District of Kansas, naming as the defendant the Commandant of the Disciplinary Barracks. In his petition, Lips set forth two grounds for relief: (1) that the military judge improperly admitted into evidence certain sexually explicit materials taken from his apartment by the arresting officers; and (2) that the prosecutor violated his right against self-

incrimination by referring to his post-arrest silence in cross-examination and in closing argument.

The district court rejected the first ground Lips advanced for habeas relief, but found Lips' second ground for relief based on improper reference to post-arrest silence to be meritorious and ordered the government to provide Lips with a new trial within 120 days or release him. The Commandant appeals the district court's grant of habeas relief (our No. 92-3359). Lips cross appeals that part of the district court's order denying relief on his first ground, i.e., the admission of the sexually explicit materials (our No. 92-3360). On motion, another panel of this court entered an order staying the judgment of the district court pending disposition of this appeal.

Limited background information regarding the court-martial is in order. The testimony of Cynthia Carite at trial established, *prima facie*, that Lips had committed the various crimes with which he was charged. Cynthia Carite testified, *inter alia*, that on the night in question Lips had shown her certain sexually explicit materials, including magazines and video tapes. After Lips' arrest, the officers searched his apartment and took certain magazines and tapes, some of which were later received into evidence at trial, over objection. The admission of these materials constituted Lips' first ground for habeas relief.

Although Lips had made no post-arrest statements to authorities, he did testify at trial and admitted that he had done the various acts to which Cynthia Carite had testified, but further testified that she had consented thereto. Lips' post-arrest silence was first raised by defense counsel in his direct examination of Lips. At the outset of direct examination, defense counsel asked Lips why he had made no post-arrest statements to the authorities. Lips answered that he had remained silent on the advice of counsel.

In cross-examination, the prosecutor attempted to show that the real reason Lips made no post-arrest statements was that he desired to hear Cynthia Cartie's testimony in court before giving anyone his version of events so that he could "tailor" his testimony and make it believable. Further, in closing argument to the military judge, the prosecutor stated that while Lips' post-arrest silence was no evidence of guilt, Lips had nonetheless waited until trial "to tell his story," so that he could first hear Cynthia Carite's testimony. Defense counsel made no objection at trial to the prosecutor's argument, which is not altogether surprising since the prosecutor conceded, in front of the military jury, that Lips' post-arrest silence was no evidence of guilt. The prosecutor's cross-examination of Lips and his closing argument to the jury constitute Lips' second basis for habeas relief.

Our study of the matter leads us to conclude that although the federal district court had jurisdiction to entertain Lips' petition, its scope of review was initially limited to determining whether the claims Lips raised in his federal habeas corpus petition were given full and fair consideration by the military courts. If they were given full and fair consideration, the district court should have denied the petition. The record indicates to us that the military courts did give full and fair consideration to the matters Lips sought to have the federal district court review. Therefore, the judgment of the district court granting habeas corpus relief is reversed and the case remanded to the district court with directions to deny the petition.

The military has its own independent criminal justice system governed by the Uniform Code of Military Justice. 10 U.S.C. §§ 801-940. The Code is all-inclusive and provides, *inter alia*, for courts-martial, appellate review, and limited certiorari review by the United States Supreme Court. Lips' petition for habeas corpus collaterally attacked a general court-martial conviction that was af-

firmed on appeal by the Air Force Court of Military Review. Because of the independence of the military court system, special considerations are involved when federal civil courts collaterally review court-martial convictions.[1]

The starting point in our discussion is *Burns v. Wilson,* 346 U.S. 137 (1953). That case stands for the proposition that federal courts have jurisdiction over applicants for habeas corpus by persons incarcerated by the military courts, though "in military habeas corpus the inquiry, the scope of matters open to review, has always been more narrow than in civil cases." *Id.* at 139. The plurality in *Burns* further stated that "when a military decision has dealt fully and fairly with an allegation raised in [a petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142. In like vein, the Court stated that "[i]t is the limited funtcion of the civil courts to determine whether the military have given fair consideration to each of these claims." *Id.* at 144.

Under *Burns,* if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied. Only when the military has not given a petitioner's claims full and fair considerations does the scope of review by the federal civil court expand.

In *Dodson v. Zelez,* 917 F.2d 1250 (10th Cir. 1990), we held that review by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate con-

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[1] For an annotation on this general subject, see 95 A.L.R. Fed. 472.

sideration to the issues involved or failed to apply proper legal standards.

The district court held, in effect, that the military had failed to give adequate consideration to Lips' contention that the prosecutor in cross-examining Lips concerning post-arrest silence and in his closing argument violated Lips' Fifth Amendment right to remain silent. On that basis, the district court proceeded to review that matter *de novo*. The district court also reviewed Lips' claim regarding the admission of the sexually explicit materials without first determining whether the military had given that matter full and fair consideration. We disagree and believe that the military courts did give the matters raised in this federal habeas proceeding full and fair consideration and that the district court erred in reviewing these matters *de novo*.

The brief on behalf of appellant in the appeal to the United States Air Force Court of Military Review listed twelve numbered issues. In "Issue V," counsel asserted that three separate errors occurred during the prosecutor's closing argument. One of these errors was the prosecutor's comment on Lips' "exercise of his right to remain silent prior to trial." Counsel did not set forth as a separate issue the prosecutor's cross-examination of Lips and made only passing reference to improper cross-examination in his argument under "Issue V." In any event, the United States Air Force Court of Military Review in its opinion did not specifically refer to the improper cross-examination issue, though it did specifically comment regarding the improper closing argument issue. In this regard, that court spoke as follows:

> The appellant also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. Appellants' counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on

> appeal in the absence of plain error which doctrine we find no basis here to invoke. R.C.M. 1001(g); *United States v. Fisher*, 21 M.J. 327 (1986); *United States v. Fisher*, 17 M.J. 768 (A.F.C.M.R. 1983).

22 M.J. at 683.

We think the United States Air Force Court of Military Review gave the issue of improper closing argument "full and fair consideration," as required by *Burns v. Wilson, supra*, and also gave "adequate consideration" to the issue and applied "proper legal standards," as required by our *Dodson v. Zelez, supra*. Such being the case, the district court erred in granting habeas corpus relief based on improper prosecutorial closing argument.

As indicated, in addition to the improper closing argument issue, Lips also asserted as a basis for habeas corpus relief the prosecutor's cross-examination relating to his post-arrest silence. At trial, defense counsel made only one nonspecific objection to this line of questioning. Mil. R. Evid. 103(a)(1), like Fed. R. Evid. 103(a)(1), requires a timely and specific objection to inadmissible testimony. Moreover, counsel did not raise the issue of improper cross-examination on appeal to the United States Air Force Court of Military Review. Because defense counsel did not make a timely and specific objection to the prosecutor's cross-examination at trial and also did not assert the issue of improper cross-examination on appeal, we deem the matter as one which was not raised in the military courts.

To obtain federal habeas review of claims based on trial errors to which no objection was made at trial, or of claims that were not raised on appeal, a state prisoner must show cause excusing the procedural default and actual prejudice resulting from the error. *Murray v. Carrier*, 477 U.S. 478, 491 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). That same rule was applied by us in *Wolff v. United States*, 737 F.2d 877 (10th Cir. 1984),

wherein a federal habeas corpus procedure challenge was made to a court-martial conviction. Nothing in the record before us indicates that there was any "excuse" for either of these procedural defaults, and hence the "cause and actual prejudice" standard was not met. Accordingly, the claim of improper cross-examination will not be reviewed "on the merits" in the present federal habeas corpus proceeding. *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).[2]

By cross-appeal, Lips seeks review of the district court's holding that the use at trial of sexually explicit material taken from his apartment shortly after his arrest did not render his court-martial "fundamentally unfair." A reading of the opinion of the United States Air Force Court of Military Review indicates clearly that that court fully and fairly considered, and then rejected Lips' claim that the sexually explicit material taken from his apartment was improperly admitted into evidence. 22 M.J. at 681-83. Such being the case, the federal district court should not have made further inquiry.

Judgment reversed and cause remanded with direction to the district court to deny the petition.

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[2] Even assuming that counsel's objection at trial to the prosecutor's cross-examination was adequate and further assuming that the matter of improper cross-examination was presented to the United States Air Force Court of Military Review, the fact that the court did not specifically address the question of improper cross-examination in its opinion is not controlling. That court did specifically state that it had "examined the remaining assignments of error and resolved them against the appellant." In *Watson*, we stated that "[w]hen an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." 782 F.2d at 145.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF KANSAS

Case No. 88-3396-R

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, USDB,
Respondent.

MEMORANDUM AND ORDER

[Filed July 31, 1992]

This matter comes before the court on petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioner, an inmate at the United States Disciplinary Barracks, Leavenworth, Kansas, was convicted of rape, nonconsensual sodomy, assault, assault with a dangerous weapon, and battery, and was sentenced to twenty-five (25) years imprisonment on September 1, 1984.

In this action, petitioner challenges his conviction and asserts: (1) the trial court erred when it admitted into evidence a sexually explicit video tape and four sexually explicit magazines; and (2) his constitutionally guaranteed right to remain silent under the Fifth Amendment was violated when trial counsel (prosecutor) impermissibly, and repeatedly, questioned him on cross-examination about his post-arrest silence. Counsel also commented during closing argument on petitioner's silence.

Having reviewed the record in this matter, the court makes the following findings and order.

Factual Background

In June, 1984, petitioner was serving on active duty in the United States Air Force at Hahn Air Force Base, Federal Republic of Germany. On June 4, 1984, while petitioner's wife was in Texas, Cynthia Carite came to petitioner's home for dinner. During the course of the evening, sexual intercourse and sodomy occurred. Petitioner claimed the events, which included bondage, oral sex, and physically harsh behavior, such as spanking, were consensual. Carite contended petitioner forced her at gunpoint and knifepoint to perform the acts described.

On September 1, 1984, petitioner was convicted of rape, nonconsensual sodomy, assault, assault with a dangerous weapon, and battery. He was sentenced to: reduction to the lowest enlisted grade (E-1), forfeiture of all pay and allowances, a dishonorable discharge, and confinement for a period of twenty-five (25) years. On June 19, 1985, the sentence was approved except for a reduction in the term of confinement to twenty (20) years.

Petitioner properly appealed his case to the Air Force Court of Military Review (AFCMR) citing five (5) errors, including the two (2) currently before this court on his habeas petition. The AFCMR affirmed petitioner's conviction and sentence. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The court found that the sexually explicit material was properly admitted. The court also found that petitioner's claim of impermissible prosecutorial comment on his post-arrest silence had been waived for failure to object at trial. Petitioner's motion for grant of review was denied by the United States Court of Military Appeals (CMA). *United States v. Lips*, 24 M.J. 45 (USCMA 1987). A petition for reconsideration was also denied. *United States v. Lips*, 24 M.J. 203 (USCMA 1987). Petitioner's motion for a new trial was denied by the Judge Advocate General of the Air Force on August 13, 1987.

Petitioner commenced this action on October 27, 1988.

Discussion

Petitioner's first claim is that the trial court erred when it admitted into evidence the sexually explicit videotape and magazines. Any errors in the admissibility of evidence are not grounds for habeas relief absent a showing that the trial was so fundamentally unfair that it constitutes a denial of due process. *Martin v. Kaiser,* 907 F.2d 931, 934 (10th Cir. 1990). With respect to claims which assert a denial of due process, this court will not question the evidentiary or procedural rulings of the trial court unless petitioner can show that, because of the court's actions, his trial, as a whole, was fundamentally unfair. *Tapia v. Tansy,* 926 F.2d 1554, 1557 (10th Cir.) *cert. denied,* —— U.S. ——, 112 S.Ct. 115 (1991).

Petitioner claimed the introduction of the sexually explicit evidence was highly prejudicial. This, however, is usually true of any relevant evidence. The trial judge admitted the evidence to show motive, intent, plan, and design.

Petitioner has failed to show that the trial judge's ruling resulted in a fundamentally unfair trial. This court finds petitioner's first claim is without merit.

Petitioner's second claim is more problematic and one which this court believes requires it to grant the writ.

The court acknowledges that its review of a claim made in a military habeas corpus petition is limited. In *Dodson v. Zelez,* 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit Court of Appeals identified the four factors necessary for a determination of whether review of a military conviction on habeas corpus is appropriate. The factors to be considered are: (1) the asserted error must be of substantial constitutional dimension; (2) the issue must be one of law rather than of disputed fact already determined by the military tribunal; (3) military considerations may warrant different treat-

ment of constitutional claims; and (4) the military court must give adequate consideration to the issues involved and apply proper legal standards. *Id.*

First, there can be little question that the asserted error, impermissible comment on petitioner's post-arrest silence, is of substantial constitutional dimension. Once a suspect has been apprised of his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), he is assured that his silence will not be used against him.[1] The use of his silence to impeach his testimony at trial is fundamentally unfair and violates the protection provided by the Fifth Amendment. *United States v. Barton*, 731 F.2d 669, 675 (10th Cir. 1984).

Second, the issue before the court is clearly one of law rather than a fact question previously determined by the military tribunal.

Third, this court finds no unique military consideration which apply to this issue.

Finally, this issue was raised before the military courts of review, but those courts found the issue had been waived for lack of a contemporaneous objection. Although this summary dismissal might not in itself justify this court's review, when considered with the other three factors, the court holds this claim meets the requirements for review. *Dodson* at 1253.

The test, in this circuit, for determining whether there has been an impermissible comment on a defendant's right to remain silent at the time of, and subsequent to, his arrest is "whether the language is manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." *U.S. v. Mora*, 844 F.2d 233, 235 (10th Cir.) *cert. denied Mora v. United States*, 488

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[1] The equivalent of the *Miranda* warnings in the military is found in Article 31(b) of the Uniform Code of Military Justice.

U.S. 995 (1988). Furthermore, "the court must look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury." *Id.* If some other equally plausible explanation exists for the prosecutor's comments, manifest intent will not be found. *Id.*

A review of the transcript in this case reveals numerous occasions during cross-examination where the prosecutor repeatedly referred to petitioner's failure to "tell anyone his story until now." During cross-examination of petitioner, the following questions and answers took place:

> Q. And you waited to talk about it until today for the reason you told us, because it seemed to you to be a good idea, and your lawyers told you it was a good idea, correct?
>
> A. I waited to tell you about it today, Sir?
>
> Q. Talk to anybody about it.
>
> A. There was no way I could have told anybody—anybody about this from the get-go. There's no way I could tell anyone anything.
>
> Q. You don't think that the OSI would have talked to you? You don't think I would have talked to you? You don't think Captain Basten would have talked to you? You don't think that the jailer would have talked to you? . . .
>
> Q. In fact, unlike you, the victim in this case has talked about this over and over and over and over again, to OSI agents, to people involved in the government's side of this case, to your lawyers, at an Article 32 Investigation, over and over and over again. She talked—
>
> (Transcript, Vol. IX, p. 965-66).

At pages 1090-91 the following exchange occurs:

> Q. Sergeant Lips (sic), you sat on this witness stand on Saturday and just as you told these people

for the first time to any government authorities of any kind—certainly, for the first time to me—you told this story, correct?

A. I did not tell you that was the first time I told any government authorities.

Q. What government authorities have you told it to before?

A. Captain Marlow.

Q. Who is your defense counsel.

A. Yes, sir.

Q. Who you understand operated only in your interest, correct?

A. Correct. . . .

Q. And that's why you told it to him as opposed to any of these people that you wouldn't talk to, correct?

(Transcript, Vol. X, p. 1090-91).

The court notes there are numerous other exchanges throughout the transcript where direct comment was made concerning petitioner's post-arrest silence. Perhaps the most compelling example is found at page 1238 of the transcript:

Q. You know what's going on here is that you have chosen not to talk about this for the reasons that you told us because it was the advice of counsel and because you though it was in your best interests. But you also know that if you wanted to talk about it, you could have each and every day. You could have talked to me. You could have talked to Captain Basten. You could have talked to the OSI. You could have talked to your commander. You could have talked to any number of people. Now isn't that true in spite of what you sat here a minute ago and said? Isn't that very simply the situation that you've been in?

(Transcript Vol. XI, p. 1238).

Using the test stated in *Mora*, this court concludes that the manifest intent of the prosecutor was to comment on the petitioner's post-arrest silence and, thus, attack his credibiliy. Furthermore, the natural and necessary impact is that the jury would draw the conclusion that the comments and questions concerned petitioner's right to remain silent.

The court can find no other plausible explanation for the prosecutor's comments. The government, in its brief, argues that petitioner's counsel invited these comments by asking on direct examination whether this was the first time petitioner had told his story to the government officials. (Transcript, Vol. IX, p. 838). The government cites no case authority to support its argument.

This circuit has held that under certain circumstances defense counsel may invite prosecutorial comment on defendant's post-arrest silence and that such an invitation leads to harmless error. In *U.S. v. Pino*, 827 F.2d 1429 (10th Cir. 1987), defense counsel asked on direct examination why petitioner had not told the arresting officer the truth when he was picked up. Defense counsel further asked defendant why he had not told the FBI the truth. A third time, defense counsel asked defendant about who questioned him and how he answered. *Id.* at 1432. When the prosecutor narrowly cross-examined on these questions, the court found no error. The court cautioned, however, that pursuit of any further questioning by the prosecutor would have resulted in impermissible comment on defendant's post-arrest silence. *Id.* at 1432.[2] Two important distinctions between *Pino* and

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[2] In *Greer v. Miller*, 483 U.S. 756, 766 (1987), the Court held that impermissible comment on defendant's post-arrest silence did not result in a violation of defendant's due process rights where the prosecutor asked only a single question, defense counsel lodged an immediate objection and the court gave an immediate curative instruction followed by a second curative instruction when the jury retired for deliberation.

the case before this court are that there was very strong, if not overwhelming evidence of defendant's guilt in *Pino* and the court gave a prompt curative instruction after which the government refrained from any additional comments on defendant's silence.

The court finds that *Pino* is clearly distinguishable on its facts and does not apply in this case. Defense counsel did not invite the impermissible and repeated comments by the prosecutor on petitioner's post-arrest silence.

In *Johnson v. Patterson*, 475 F.2d 1066, 1067 (10th Cir.) *cert. denied* 414 U.S. 878 (1973), the defendant, like petitioner, was accused of rape and acknowledged that sexual activity had taken place. He also testified the activity was consensual. During cross-examination, in much less egregious terms than in the case before this court, the prosecutor commented on defendant's failure to tell the police his story following his arrest. *Id.* During closing argument the prosecutor again commented on defendant's silence. The court held defendant's constitutional right to remain silent had been violated and affirmed the grant of the writ of habeas corpus. The court said: "It would indeed be irregular and anomalous to warn an accused that he had the right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him." *Id.* at 1068.

The court believes that this case, like *Johnson*, was mainly a test of the credibility of the victim and the petitioner. In such a case, the prosecutor's impermissible comment on petitioner's post-arrest silence is even more damaging. In similar situations when juries have been presented with two versions of the same incidents, it has been held "where the case comes down to a one-on-one situation, i.e. the word of the defendant against the word of a key prosecution witness, and there is no corroboration on either side, the importance of the defendant's credibility becomes so significant that prosecutorial

error attacking that credibility cannot be considered harmless beyond a reasonable doubt." *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985).

The government argues that counsel's failure to object at trial waived the issue and the military review court so found. The record, however, shows one objection made by counsel. In addition, the military review court's order only spoke to the failure to challenge the statements made during argument. The court assumes that this refers to the prosecutor's statements during closing argument rather than questions during cross-examination Therefore, the objection made during cross-examination preserved the issue for review. In *Barton* the court held that even absent an objection at trial, the magnitude of the right to post-arrest silence constitutes plain error and the lack of an objection may be disregarded. 731 F.2d at 675. See *United States v. Howell*, 18 M.J. 573, 575 (military judge has duty to instruct on prosecutor's impermissible comment on defendant's post-arrest silence despite defense counsel's failure to object).

In this case, even if the court did not find the issue preserved, it finds that under plain error analysis, the continuous and repeated comment on petitioner's post-arrest silence was "obvious and substantial error that affected the fairness, integrity or public reputation of judicial proceedings." *U.S. v. Jefferson*, 925 F.2d 1242, 1254 (10th Cir.) *cert. denied* —— U.S. ——, 112 S.Ct. 238 (1991) citing *United States v. Guzman*, 781 F.2d 428, 431-32 (5th Cir.) *cert. denied* 475 U.S. 1143 (1986).[3] The prosecutor's repeated comments on peti-

[3] The court notes that this circuit, in *United States v. Massey*, 687 F.2d 1348, 1353 (10th Cir. 1982), has articulated five factors relevant to the determination of whether prosecutorial comment on post-arrest silence is harmless. These include: (1) the use to which the prosecutor puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence of guilt; (4) the intensity and frequency of the reference; and

tioner's post-arrest silence resulted in a violation of the constitutional rights guaranteed under the Fifth Amendment. Consequently, petitioner did not receive a fair trial and should be afforded a new trial.

IT IS THEREFORE BY THE COURT ORDERED that the government must provide petitioner with a new trial within 120 days or grant his release. The writ of habeas corpus is granted.

DATED: This 31st day of July, 1992, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

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(5) the availaiblity of the trial judge of an opportunity to grant a motion for a mistrial or to give curative instructions.

In this case, the prosecutor obviously used petitioner's post-arrest silence to attack his credibility. The evidence of guilt clearly depended upon whose story was believed. The prosecutor vehemently and continuously commented and questioned on the silence. The trial judge failed to interpose curative instructions.

The only factor which is questionable in this case is who elected to pursue the line of questioning. However, defense counsel's one rather ambiguous question on direct examination about whether this was the first time petitioner had told his story to government authorities did not warrant the barrage of comment and questions from the prosecutor.

On this record, the error cannot be deemed harmless.

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

No. 55284/AF

CMR 24883
U.S.

v.

WILLIAM M. LIPS

PETITION FOR RECONSIDERATION DENIED

April 17, 1987

On consideration of appellant's petition for reconsideration and motions to file documents and to file corrected page, it is ordered that the motion to file corrected page is hereby granted; that the motion to file documents is hereby denied; and that the petition is hereby denied.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

No. 55284/AF

CMR 24883

U.S.

v.

WILLIAM M. LIPS

ORDERS DENYING PETITION FOR REVIEW

March 2, 1987

APPENDIX E

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 24883

UNITED STATES

v.

SENIOR MASTER SERGEANT WILLIAM M. LIPS,
FR 041-38-5639, United States Air Force

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2 May 1986

Appellate Counsel for the Accused: Mr. Vaughan E. Taylor and Mr. George Martin Kripner, Jacksonville, North Carolina 28540. Colonel Leo L. Sergi, Major Conrad C. Baldwin, Jr., Captain Timothy J. Malloy and Captain Charles L. Wille.

Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Andrew J. Adams, Jr., and Major David F. Barton.

Before HODGSON, FORAY and MICHALSKI Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

This is an appeal from a conviction of rape, forcible sodomy and three allegations of assault culminating in an approved sentence of a dishonorable discharge, 20 years confinement, total forfeitures and reduction to airman basic. The appellant is a senior non-commissioned officer with years of outstanding service. The complaining witness is the dependent wife of a serviceman from whom she was in the process of divorcing although at the time of her encounter with the appellant she was living with

another airman. In affirming the conviction we deem it appropriate to discuss some of the assigned errors.

I

The victim's husband and the appellant were assigned to the same organization and it was at squadron parties that the appellant and the victim first met. She and her husband had been to the appellant's apartment for dinner several times, and on those occasions the appellant's wife was present. After the complainant and her husband separated, she would see the appellant and talk to him—sometimes at the on-base convenience store where she worked. On 3 June, the appellant asked her over for dinner the next evening. She accepted and told her boy friend where she was going, which was about two blocks away. When she arrived at the appellant's house at about 1730 hours and saw his wife was not there, she assumed Mrs. Lips was working and would be home later. While they were sitting in the living room, the appellant tossed her a magazine [1] and said, "Here read this while I go get . . . some appetizers." The article he wished read was entitled "Professor of Pleasure." When she started reading, the appellant put his arm around her shoulder and a knife to her neck, saying, "Drop your pants, shirt and bra." He bent her over the coffee table and tied her hands and legs to it. He then laid underneath her and performed an act of cunnilingus. Later, the appellant pointed a gun at her, said, "Are you ready for the appetizer" and indicated she was to perform fellatio on him. When she exhibited some reluctance, he told her, "[you have] until the count of five to get it in [your] mouth."

While this episode was continuing the appellant put devices on her breasts described as "nipple clamps." There was conflicting testimony as to how painful this apparatus was. He then hit her four or five times on the buttocks with a belt saying, "You can [perform fellatio]

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[1] Penthouse Variations, May 1984, pages 12-18.

better than that." This activity stopped when the phone rang and the appellant answered. When he finished the conversation he brought her a drink and followed her into the bathroom. In response to her query, "Why me?", the appellant replied, "Because you're the most perfect one—you're separated from your husband and living with another man." He indicated that "7 out 10 rapes go unreported." Subsequently, the appellant cooked a meal for himself and the victim.

Later, they went into the bedroom and engaged in sexual intercourse and mutual oral copulation. During this episode the appellant attempted anal sodomy using a lubricant from a blue and white tube; he was unsuccessful.

The victim left the appellant's apartment at about 2130 hours and went home. She said nothing about the incident to her boy friend until noon the next day when she told him about the incident and he convinced her to report the matter. Medical examination disclosed bruises on her buttocks "three fingers wide" and abrasions on her wrists consistent with being tied with a rope.

A search of the appellant's apartment disclosed a knife, a gun, "nipple clamps" and ropes. Over defense objection the trial judge admitted a video tape and five magazines containing explicit sexual behavior between men and women. The dominant theme of these publications is the physical and sexual abuse of women.

The appellant admitted that his sexual encounter with the complaining witness occurred on the day alleged, but testified that the entire episode was initated by her when she came to his apartment uninvited. It was she who agreed to do something "kinky" like asking him to "spank" her with a belt. It was her idea to use the "nipple clamps" and it was she who suggested anal sodomy which he declined. The appellant acknowledged he has a "bondage fantasy," and that he had lubricant in a blue and white tube at his apartment. He also stated the complaining witness suggested that "others" might enjoy

this type of activity for money. She then demanded $200.00, and when he refused, threatened to tell his wife and otherwise harm his career. After he gave her only $60.00, she said, "You will pay." He also offered testimony of the victim's next door neighbor who stated she heard the victim say, "Don't hit so hard," "Quit, it hurts" and "Stop." The witness attributed this conversation to some type of sexual activity.

Finally, the appellant offered extensive evidence as to his good character and reputation for truthfulness.

In rebuttal, the government established that it is not unusual for a rape victim to delay reporting the incident because of feelings of shame and belief that no one will accept what happened. Additionally, there was evidence by the victim's exspouse and current partner that her sexual preferences did not include being beaten or physically abused.

II

The appellant contends the trial judge erred in admitting a sexually explicit video tape and similar literature found in his apartment. He argues that Mil.R.Evid. 404(b)[2] does not apply as his possession of the seized material was lawful and not probative of any contested issue. He also urges that prejudicial effect of the challenged evidence is enormous. *See* Mil.R.Evid. 403.

The appellant is correct in that possession of sexually explicit materials is lawful. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). He is also correct that the admission of such materials is prejudicial.

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[2] Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But this is true of any relevant evidence, and in order to be admissible under Rule 404(b) the evidence of "OTHER CRIMES, WRONGS OR ACTS" must: 1) Establish a matter in issue other than the accused's propensity to commit the crime charged; 2) The other acts are similar enough to be relevant; 3) The evidence of the other acts is clear and convincing; and 4) The probative value of the other acts is not substantially outweighed by the danger of unfair prejudice. *United States v. Tuchow*, 768 F.2d 855 (7th Cir.1985); *United States v. Beechum*, 582 F.2d 898 (5th Cir.1978). To resolve this assigned error we must examine the record in light of the criteria just stated.

Mil.R.Evid. 404(b) states that evidence of other acts are admissible to establish ". . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The rule provides examples of bases for admission of other acts rather than an exclusive list. By decision we have included *modus operandi*, *United States v. Barus*, 16 M.J. 624 (A.F.C.M.R. 1983), and the accused's consciousness of guilt, *United States v. Borland*, 12 M.J. 855 (A.F.C.M.R.1981), as other reasons for which other acts are admissible.

What matter in issue does the appellant's possession of materials depicting the sexual and physical abuse of women establish? The trial judge admitted the evidence as tending to establish motive, intent, plan and design. Commendably, he explained on the record why he concluded the probative value of the proffered evidence was not outweighed by the danger of unfair prejudice to the appellant. *See United States v. Holt*, 21 M.J. 946 (A.F.C.M.R.1986). Our task now is to determine whether the trial judge clearly abused his discretion in this regard. *United States v. Barus, supra; United States v. Byrd*, 771 F.2d 215 (7th Cir.1985).

Motive is that which incites or stimulates a person to do an act. *People v. Weiss*, 252 A.D. 463, 300 N.Y.S.

249 (1937). As such it is a state of mind tending to show the basis for that individual's behavior. *See United States v. Watkins*, 21 M.J. 224 (C.M.A.1986). The possession of graphically posed photographs showing women being sexually and physically abused is a clear indication of the appellant's emotional penchant for sexual aberration. *See State v. Bailey*, 125 Ariz. 263, 609 P.2d 78 App. 1980). Thus, the admission of this material would tend to supply a motive for the appellant to commit the acts alleged.

His trial theory, that the victim had consented to the sexual acts, was tantamount to a denial that he had intended to achieve oral copulation and sexual intercourse by force. The challenged evidence is admissible to establish his intent in this trial by corroborating the victim's testimony that she did not consent to the sexual acts. *People v. Jackson*, 110 Cal.App.3d 560, 167 Cal.Rptr. 915 (1980). Such evidence is relevant because most sex offenses occur in private and the determination of witness credibility is a crucial role. *People v. Thomas*, 20 Cal. 3d 457, 143 Cal.Rptr. 215, 573 P.2d 433 (1978).

The seized sexually-oriented material also tends to establish preparation for the charged offenses in the sense that he had photographic depictions available suggesting the activity in which he wished to participate. The photographs and the video tape depicted scenarios for nonconsensual sex. These materials together with the knife, gun, ropes, "nipple clamps," lubricant and magazine he initially provided the victim when she arrived, are all indicative of preparation and planning to achieve what the victim said occurred.

Of the remaining *Tuchow* factors, those left are also clearly established. There is no question that the sexual activity protrayed in the magazines and video tape and the offenses being tried are sufficiently alike to be relevant. The photographs shows women being sexually abused in a manner the victim claims happened to her.

Also, it is clear that the challenged evidence belonged to him—he admitted the material was his. We further conclude the evidence offered on the question of motive, intent, plan and design was relevant as it had "a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Mil.R.Evid. 401.

Based upon the facts before us we hold the trial judge was within the broad discretion given him to admit the challenged evidence. We find no basis to overturn the lower court's ruling on this issue. *United States v. Richardson*, 764 F.2d 1514 (11th Cir.1985).

III

The appellant next argues that the trial judge erred when he allowed Doctor Freddy E. Drummond, a clinical psychologist with experience in counseling rape victims, to testify in rebuttal that a high number of rapes i.e., between approximately 70-90% go unreported or are delayed in being reported because the victim is ashamed or fearful that no one will believe her. It was the defense's position that Doctor Drummond had no special expertise in this area and relied on hearsay, i.e., books and articles to gain the necessary knowledge. In a collateral assertion of error the appellant also contends that the government should not have been permitted to offer, in rebuttal, testimony that the victim's sexual preferences did not include "rough sex."

The purpose of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party. *United States v. Shaw*, 9 U.S.C.M.A. 267, 26 C.M.R. 47 (1958). Certainly testimony by the victim's past and present sexual partners that she did not enjoy "rough sex" tends to negate evidence by the defense that she did. Further, Doctor Drummond is permitted under Mil.R.Evid. 703 to rely on facts and data known to him that are neither admitted nor admissible in

evidence, so long as they are of a type "reasonably relied upon by experts in the particular field in forming an opinion or inference upon the subject. *United States v. Neeley*, 21 M.J. 606 (A.F.C.M.R.1985); *see also United States v. Eastman*, 20 M.J. 948 (A.F.C.M.R. 1985). The admission or exclusion of evidence on rebuttal rests largely within the sound discretion of the trial judge which we find he properly exercised. *United States v. Posey*, 647 F.2d 1048 (10th Cir.1981).

IV

The appellant also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. Appellant's counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error which doctrine we find no basis here to invoke. R.C.M. 1001 (g); *United States v. Fisher*, 21 M.J. 327 (1986); *United States v. Fisher*, 17 M.J. 768 (A.F.C.M.R. 1938).

V

The appellant argues the evidence is insufficient to prove beyond a reasonable doubt that he is guilty of the offenses charged. He puts forth numerous reasons to support this argument. They are: the victim's testimony is so riddled with inconsistencies that it is not credible; his version of the incident, although it pictures him as less than an ideal husband, is very credible; he has an outstanding military record and a good reputation for truthfulness which lends weight to his version of the facts; and the victim is antagonistic toward him and claimed rape only after he refused to pay her the amount she demanded for the sexual services to which she willingly consented.

That a sexual encounter took place between the appellant and the victim is not disputed—the question is

whether she consented to his actions. When a crucial issue must be resolved in terms of essentially "a one-on-one confrontation," corroborative evidence of guilt is a factor to be weighed. *United States v. Pastor*, 8 M.J. 280 (C.M.A. 1980); *United States v. King*, 17 M.J. 1099 (A.F.C.M.R. 1984). The available corroborative evidence includes: the victim reporting the incident, albeit the next day, the gun, knife, ropes, and lubricant, sexually explicit video tape, and the sexually-oriented magazine the victim testified the appellant used in the assault were found in his apartment. The appellant's explanation of why he possessed these items was before the court.

Much of the crucial testimony offered by the appellant and the complaining witness is in toal conflict. She said he invited her to dinner that evening; he stated she came to his house uannounced. He testified she was the one who broached the subject of "kinky sex" i.e., being bound, beaten, anal sodomy and use of the "nipple clamps."; her version focused on the appellant using a knife and gun to force her to submit. It is readily apparent that the outcome of the trial rested on the weight the members chose to give to the testimony of each witness. *United States v. Lecappelain*, 9 M.J. 562 (A.F.C.M.R.1980).

We have a statutory mandate to review the evidence and in so doing we must judge the credibility of witnesses and determine controverted questions of facts, recognizing that the trial court saw and heard the witnesses. Article 66(c), U.C.M.J., 10 U.S.C. § 866(c). Proof beyond a reasonable doubt as to an accused's guilt does not mean that the evidence must be free of conflict. *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R.1984). This was a vigorously contested trial with both the appellant and the government offering a full measure of evidence to support their theory of the case. We have examined the record of trial and, like the trial court, we are convinced beyond a reasonable doubt that the appellant is guilty of the offenses alleged.

VI

We have examined the remaining assigned errors and resolve them against the appellant. *United States v. Whiting*, 12 M.J. 253 (C.M.A. 1982); *United States v. Henderson*, ACM 24341, 31 August 1984, *pet. denied*, 21 M.J. 38 (C.M.A.1985); see *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985).

VII

Finally, appellant defense counsel suggest that the approved sentence is inappropriately severe given the appellant's past outstanding military record. It is, of course, true that an outstanding military record is a mitigating factor in reviewing the appropriateness of a sentence. *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985). But the scales of punishment must also weigh the seriousness of the crime. Here the appellant has been convicted of a series of aggravated sex offenses with the same victim. Under the facts of this case we consider the approved sentence to be entirely appropriate. For the reasons stated the findings of guilty and the sentence are

AFFIRMED.

FORAY, Senior Judge and MICHALSKI, Judge, concur.